

1-1979

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Recommended Citation

Laurence M. Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 HASTINGS L.J. 1515 (1979).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol30/iss5/13

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Interstate Libel and Choice of Law: Proposals for the Future

By LAURENCE M. ROSE*

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.¹

By those words, the United States Supreme Court in 1974 instructed the states that "any standard save strict liability"² could be devised to determine the fault of a media libel defendant. Since that time each state has struggled to determine the fault standard it should apply, and many states have adopted different fault standards with separate methods of determining what acts violate those standards.³ Many litigants and courts have failed to see the possibility of a choice of law question, namely, which state's fault standard should apply to an allegedly libelous statement which was investigated, written, edited, or published in another state.⁴

While some commentators have noted the existence of this choice of law question,⁵ no one has discussed the matter in any depth.⁶ This issue has recently become most important, primarily due to the variety

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1. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

2. *Id.* at 348 n.10.

3. See notes 87-126 & accompanying text *infra*.

4. See, e.g., *Lake Havasu Estates, Inc. v. Reader's Digest Ass'n*, 441 F. Supp. 489, 492 (S.D.N.Y. 1977). In that case, however, the judge recognized the issue but did not decide it. See also *Lambert v. Providence Journal Co.*, 508 F.2d 656, 658 n.6 (1st Cir. 1975).

5. See Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271, 275-76 n.19 (1976); Note, *The Gertz Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227, 234 & n.57 (1975); Recent Development, *State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1431, 1446 (1976).

6. A hypothetical fact pattern was proposed in Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 LAW & CONTEMP. PROB. 85, 91 (1977), which assumed that

of fault standards and fact patterns being developed. Plaintiffs need to know, prior to institution of the lawsuit, the fault standard by which their cases will be decided, as a dismissal based upon the pleadings may otherwise occur.⁷ Publishers should know, far in advance of publication, what they must do to meet their standard of competence.⁸ Existing choice of law rules have revolved around the availability of defenses or the statute of limitations, rather than standards of fault.⁹

This Article will attempt to clarify the choice of law question by providing a framework for the determination of the appropriate fault standard to be applied. Initially, however, some examination of the fault standards furnished by the Supreme Court should be made.

Libel Standards Through *Gertz*

Prior to 1964, the American common law provided that a prima facie libel case was made out when the plaintiff pleaded and proved that a statement, defamatory of the plaintiff, was published by the defendant and read by another.¹⁰ A statement was considered defamatory if it tended to injure the plaintiff's reputation in the community or deter others from associating with the plaintiff.¹¹ Publication was defined as communication to another, whether intentionally or negligently made.¹² The third person must also have reasonably understood the statement to refer to the plaintiff.¹³

Since a defamatory statement concerned fundamental reputational interests, the common law presumed that all such statements were false, and the plaintiff was not required to plead or prove falsity.¹⁴ Similarly,

the law of the state of circulation would apply even though the plaintiff was domiciled in a different state and the information for the story came from a third state.

7. For example, in some jurisdictions a plaintiff may have to request a retraction or plead special damages. See *Hanley v. Tribune Publishing Co.*, 527 F.2d 68 (9th Cir. 1975). See also Justice White's dissent in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 375-76 (1974).

8. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 992-93 (1953) [hereinafter cited as *Interstate Publication*]. See also Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion*, 3 HASTINGS CONST. L.Q. 363, 365, 367 (1976); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 460-61 (1975); Note, *The Gertz Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227, 237 (1975). The publisher's need to know the different fault standards governing public and private figures was discussed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-46 (1974).

9. See, e.g., *Hanley v. Tribune Publishing Co.*, 527 F.2d 68 (9th Cir. 1975).

10. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114, at 776 (4th ed. 1971) [hereinafter cited as PROSSER].

11. RESTATEMENT OF TORTS § 559 (1938); PROSSER, *supra* note 10, § 111, at 737.

12. RESTATEMENT OF TORTS § 577 (1938); PROSSER, *supra* note 10, § 113, at 766, 771.

13. RESTATEMENT OF TORTS § 564 (1938); PROSSER, *supra* note 10, § 111, at 749.

14. RESTATEMENT OF TORTS § 582 (1938); PROSSER, *supra* note 10, § 116, at 798.

the plaintiff was not required to plead or prove that he or she had suffered any damage as a result of the statement; damages were also presumed.¹⁵ While at one point the plaintiff was required to plead and prove the defendant's improper motive or spite, it was later held that this requirement of "malice" would be implied from the publication of the statement.¹⁶ In a media context, the act of printing or broadcasting the statement implied receipt by another of the statement.¹⁷

The common-law media-libel defendant, then, was held strictly liable for all publications of defamatory statements, however innocent, unknowing, unintentional, or negligent.¹⁸ Certain defenses, such as truth,¹⁹ absolute privilege,²⁰ conditional privilege²¹ and privileged criticism²² could be raised and proved by the defendant to avoid liability.²³ The plaintiff was allowed, however, to defeat a conditional-privilege defense by showing that the defendant acted recklessly or with a specific intent to injure the plaintiff.²⁴

15. RESTATEMENT OF TORTS § 569 (1938); PROSSER, *supra* note 10, § 112, at 762. It must be noted at this point that the common law distinguished libel from slander and imposed upon plaintiffs in certain slander suits the necessity of proving "special harm." RESTATEMENT OF TORTS §§ 568, 570-575 (1938). Similarly, the common law distinguished libel *per se* (defamatory on its face) from libel *per quod* (where other facts are needed to show the defamatory meaning), the latter also requiring proof of "special damages." PROSSER, *supra* note 10, § 112, at 763. Since the only topic under discussion is media libel, further reference to slander or the *per se/per quod* distinction will not be made.

16. PROSSER, *supra* note 10, § 113, at 771-72 (citing *Bromage v. Prosser*, 107 Eng. Rep. 1051 (K.B. 1825)).

17. RESTATEMENT OF TORTS §§ 568, Comment f, 577, Comments b & c (1938); PROSSER, *supra* note 10, § 112, at 753-54, § 113, at 767, 775-76.

18. RESTATEMENT OF TORTS §§ 577, 579-580 (1938); PROSSER, *supra* note 10, § 113, at 772-74.

19. RESTATEMENT OF TORTS § 582 (1938); PROSSER, *supra* note 10, § 116, at 796-99. In some states, truth was a defense only if there was no intent to harm the plaintiff. RESTATEMENT OF TORTS § 582, Comment a (1938); PROSSER, *supra* note 10, § 116, at 797. *See also* Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964).

20. Absolute privileges included consent of the person defamed, judicial immunity, legislative immunity, executive immunity, and husband-wife conversational immunity. RESTATEMENT OF TORTS §§ 583-592 (1938); PROSSER, *supra* note 10, § 114, at 776-85.

21. Sometimes called qualified or defeasible privileges, these defenses included protection of the publisher's legitimate interests, protection of the interests of others, a communal interest with the third person, or a need to inform on a public interest matter. RESTATEMENT OF TORTS §§ 594-596, 598 (1938); PROSSER, *supra* note 10, § 115, at 785-92.

22. At common law, fair comment upon the public activities and qualifications of public officials, candidates, and employees was permitted, as was comment upon their private activities that pertained to their public conduct. RESTATEMENT OF TORTS §§ 606-607 (1938); PROSSER, *supra* note 10, § 118, at 819-20.

23. RESTATEMENT OF TORTS § 613 (1938); PROSSER, *supra* note 10, § 114, at 776, § 115, at 796.

24. RESTATEMENT OF TORTS §§ 599-605, 613 (1938); PROSSER, *supra* note 10, § 115, at

In 1964, the Supreme Court began to alter the common-law media-libel standard by gradually shifting the requirements of proof from the defendant to the plaintiff. In *New York Times Co. v. Sullivan*,²⁵ the Court spoke for the first time of the first amendment²⁶ protection afforded the news media against libel actions brought by public officials for criticism of their official actions. Sullivan alleged that he had been libeled by an advertisement in the *Times* which stated that the Montgomery, Alabama, police had violated the law and, as the supervisor of the police department, the statements reflected upon him.²⁷ The Supreme Court of Alabama had commented that the *Times*, although it relied upon the good reputation of its source, acted irresponsibly by not checking its own files to determine the accuracy of the statements in the advertisement, and from this failure one could infer malice sufficient to support a punitive damage award.²⁸ While Alabama law permitted privileged criticism of the actions of a public official, this privilege required the truth of the facts upon which the fair comment was premised.²⁹ The United States Supreme Court, however, determined that the freedoms of speech and press recognized the inevitability of erroneous statements, honestly made, of an official's conduct,³⁰ and held that imposing upon the *Times* the burden of proving truth was impermissible.³¹ Citing *Coleman v. MacLennan*,³² the Court stated that a public official must prove with "convincing clarity"³³ that a statement relating to his official actions "was made with 'actual malice'—that is, with knowledge . . . of whether it was false or not."³⁴ Moreover, the Court ruled that the evidence was insufficient to show actual malice; it "at

792-96. At times, a plaintiff could defeat the conditional privilege only by showing the statement was false. See *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 357, 145 S.W. 480, 490 (1912).

25. 376 U.S. 254 (1964). Justice Brennan delivered the unanimous opinion of the Court.

26. U.S. CONST. amend. I.

27. 376 U.S. at 256-58. Alabama law did not permit Sullivan to bring a libel action for statements relating to his official conduct unless he asked for a retraction. He did so and the *Times* did not publish one as to him. *Id.* at 261.

28. 273 Ala. 656, 686-87, 144 So. 2d 25, 50-51 (1962). The statements were admittedly false. 376 U.S. at 258-59.

29. 376 U.S. at 267 (citing *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913)).

30. 376 U.S. at 271-72.

31. *Id.* at 278-79.

32. 78 Kan. 711, 98 P. 281 (1908).

33. 376 U.S. at 285-86.

34. *Id.* at 279-80.

most" showed negligence.³⁵ Thus, the common-law privilege of fair comment of official conduct³⁶ was elevated to a constitutional level, and the media libel standard was changed to require the plaintiff to prove actual malice on the part of the media defendant when public-official criticism is involved.³⁷

This standard was clarified in *Garrison v. Louisiana*,³⁸ wherein the Supreme Court applied the *New York Times* standard to criminal defamation.³⁹ The Court reaffirmed its position that actual malice could not be proven by ill will on the part of the defendant,⁴⁰ and went on to explain that *New York Times* required the plaintiff to prove that the statement made "was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true."⁴¹ Furthermore, the Court ruled that a reasonable-belief standard was not equivalent to the reckless disregard standard; "the high degree of awareness of . . . probable falsity demanded by *New York Times*"⁴² could not be proven by "mere negligence."⁴³

In *Rosenblatt v. Baer*,⁴⁴ the Court reaffirmed its position that negligent misstatement of fact would not defeat the privilege to criticize a

35. *Id.* at 286-88.

36. See note 21 *supra*. The Supreme Court expressly incorporated into a first amendment guarantee the common law doctrine of fair comment, defeasible by malice as stated in the *Restatement of Torts* § 607. 376 U.S. at 292 n.30.

37. Justices Black, Douglas, and Goldberg would have held that the freedoms of speech and press absolutely and unconditionally prevent a public official from bringing a libel action based upon criticism of his official conduct. 376 U.S. at 293-97 (Black, J., concurring); *id.* at 297-305 (Goldberg, J., concurring).

38. 379 U.S. 64 (1964). Justice Brennan delivered the unanimous opinion of the Court.

39. New Orleans District Attorney Garrison had issued public statements regarding the fitness and character of certain judges who controlled a portion of the funding for his office. *Id.* at 64-66. Justices Black, Douglas, and Goldberg would again have held these statements to be absolutely privileged. *Id.* at 79-80 (Black, J., concurring); *id.* at 80-83 (Douglas, J., concurring); *id.* at 88 (Goldberg, J., concurring).

40. *Id.* at 73-74.

41. *Id.* at 74. There has been some discussion as to whether *New York Times* actually requires a nonpublic plaintiff to prove the falsity of the statement. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1382-86 (1975). This author believes that such a requirement exists. Justice Brennan wrote the majority opinion in both *New York Times* and *Garrison*. See notes 25 & 38 *supra*. But see *Time, Inc. v. Firestone*, 424 U.S. 448, 459 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975).

42. 379 U.S. at 74.

43. *Id.* at 78-79.

44. 383 U.S. 75 (1966). Justice Brennan delivered the 7-1 opinion of the Court. Justice Fortas dissented solely on the ground that the writ was improvidently granted. *Id.* at 100. Again, Justices Black and Douglas stated their preference for an absolute privilege, objecting to the remand for a possible new trial. *Id.* at 88-91 (Douglas, J., concurring); *id.* at 94-95 (Black, J., concurring and dissenting).

public official's actions.⁴⁵ It also gave broader scope to the term "public official" by applying it to those government employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."⁴⁶ This expanded definition was based upon "the constitutional protections afforded free expression"⁴⁷ and required the court to determine the plaintiff's "public official" status as a matter of law without regard to the content of the defamatory statements.⁴⁸

Sixteen months later, the Supreme Court again had an opportunity to discuss the media libel standard in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.⁴⁹ In both cases, the Court held that constitutional protection should be extended to statements concerning public figures as well as public officials. Public figures were defined as those who command a substantial amount of public interest, either independently as a result of position, or by injecting themselves into the "vortex" of a public controversy.⁵⁰ Chief Justice Warren further described public figures as those who were "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."⁵¹ The constitutional standard extended to statements concerning public figures was the same as the standard extended to public officials.⁵² Accordingly, the media-libel standard relating to both public

45. *Id.* at 84.

46. *Id.* at 85. Moreover, if the position held is one in which the qualifications and actions are of specific public importance, the person would be considered a public official and subject to the actual malice standard. *Id.* at 86.

47. *Id.* at 84.

48. *Id.* at 88. The Court did not indicate how this issue was to be raised or who must prove it. In all likelihood, it is the defendant who must raise the privilege of public-official criticism and thereafter prove that the plaintiff was a public official. The appropriate method would appear to be in accordance with a motion for either partial or full summary judgment. See FED. R. CIV. P. 56; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 327-28 (1974).

49. 388 U.S. 130 (1967). Butts alleged that an article in the *Saturday Evening Post* accused him of "fixing" the outcome of a football game involving the school at which he was athletic director. *Id.* at 135. Walker, a private citizen, claimed a news story wrongfully stated that he had encouraged student rioters to violate a desegregation order. *Id.* at 140.

50. *Id.* at 154-55. This was not the first time that the Supreme Court had discussed persons injecting themselves into a "vortex" of the discussion of a matter of public concern. See *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

51. 388 U.S. at 164 (Warren, C.J., concurring).

52. See text accompanying notes 32-37 *supra*. Although Justice Harlan announced the judgments of the Court, his opinion was joined only by Justices Clark, Fortas, and Stewart. *Id.* at 133. Chief Justice Warren's opinion was joined by Justices Black, Brennan, Douglas, and White to the extent that it overturned the recovery allowed in *Walker*. *Id.* at 170 (Black, J., concurring and dissenting); *id.* at 172 (Brennan, J., concurring and dissenting). The Warren opinion firmly concluded that the appropriate standard to apply was the ac-

officials and public figures was a false defamatory statement about the plaintiff published with actual malice.⁵³

The actual malice standard was again discussed in *St. Amant v. Thompson*,⁵⁴ where the Court repeated that recklessness was not to be "measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant [publisher] in fact entertained serious doubts as to the truth of his publication [and still published it.]"⁵⁵ This serious doubt could, however, be shown if the story was based on an anonymous telephone call or upon an informant whose veracity or accuracy was to be doubted for some reason.⁵⁶ The defense of good faith would similarly be unavailable if it was shown that the "publisher's allegations are so inherently improba-

tual-malice requirements of *New York Times*. *Id.* at 164. Justices Brennan and White agreed. *Id.* at 172. Justices Black and Douglas reaffirmed their prior views of *New York Times* and *Rosenblatt*, that there should be an absolute privilege for the media. *Id.* at 170-72. Based upon these opinions, it is clear that the majority of the Court would impose only the *New York Times* standard upon the media in public-figure cases. See Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 298-301. The Harlan opinion would have established what seems to be a less exacting "gross negligence" standard amounting to "unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. The statement, however, must be one that "makes substantial danger to reputation apparent." *Id.* Based upon the evidence in the case, Chief Justice Warren found actual malice in *Butts*, *id.* at 165-70, while Justices Harlan, Clark, Fortas, and Stewart found a violation of their proposed standard. *Id.* at 156-58. Thus, the verdict in *Butts* was affirmed. Justices Brennan and White would have remanded for a jury determination of actual malice. *Id.* at 174 (Brennan, J., concurring and dissenting).

53. In *Walker*, the only misconduct on the part of the Associated Press was the failure to investigate a minor discrepancy between the verbal and written accounts of an eyewitness. The Court found that this evidence did not give "the slightest hint of a severe departure from accepted publishing standards." *Id.* at 159. In *Butts*, the *Post* was accused of basing its story on an unreliable eavesdropper, without checking his notes, confirming the story with another eavesdropper or investigating the facts further. *Id.* at 157. Perhaps more importantly for the eventual outcome, the contents of the story were denied by Butts and his daughter prior to publication. *Id.* at 167-70. While these acts cannot be said to meet the requirements of actual malice, see note 52 *supra*, it is likely that Justices Brennan and White would have affirmed had the jury instructions been clearer. See *id.* at 174 (Brennan, J., concurring and dissenting).

54. 390 U.S. 727 (1968). The Court found that St. Amant's failure to investigate an informant's trustworthiness or the facts in his story was insufficient to show actual malice. In addition, there was no evidence to show an awareness of probable falsity.

55. *Id.* at 731. Justice White wrote the opinion for the Court. Justices Black and Douglas concurred based upon their *New York Times* opinion. *Id.* at 733. Justice Fortas dissented on the ground that St. Amant violated a duty to check on the reliability of the informant's statement. *Id.* at 734.

56. *Id.* at 732.

ble that only a reckless man would have put them in circulation.”⁵⁷

Candidates for public office were later added to those public officials and figures to whom the media libel standard of falsity and actual malice applied. In *Monitor Patriot Co. v. Roy*,⁵⁸ and *Ocala Star-Banner Co. v. Damron*,⁵⁹ the Supreme Court stated that public discussion of the qualifications of a candidate was of such importance that it merited constitutional protection.⁶⁰ Accordingly, charges of criminal conduct, however remote in time to the election, were to be constitutionally protected by the actual-malice standard.⁶¹

Shortly thereafter,⁶² in *Rosenbloom v. Metromedia*,⁶³ a plurality of the Court determined that the public/private status of a person was irrelevant in determining whether the public has a legitimate interest in the conduct of the person.⁶⁴ If the public interest existed, then the use of a “reasonable care” standard was insufficient to protect the freedoms of speech and press.⁶⁵ In holding that the *New York Times* standard should be applied to statements in the public or general interest, the Court expressly left open the question of what standard should apply to media statements about a private person outside the area of public or

57. *Id.*

58. 401 U.S. 265 (1971). The publisher had referred to a candidate for United States Senate as a “former small-time bootlegger.”

59. 401 U.S. 295 (1971). The publisher’s area editor mistakenly changed the name of an accused perjurer to that of his brother, the mayor and candidate for another public office.

60. *Id.* at 300-01. Justice Stewart wrote the opinions in both cases. Justices Black and Douglas would again have applied an absolute privilege, denying a retrial. *Id.* at 277-78 (Black, J., concurring and dissenting). While Justice White condemned negligent reporting he agreed that negligence did not amount to actual malice. *Id.* at 301 (White, J., concurring).

61. *Id.* at 277.

62. *Monitor* and *Ocala* were decided on February 24, 1971; *Rosenbloom* was decided on June 7, 1971.

63. 403 U.S. 29 (1971). Metromedia’s radio station had reported the arrest of Rosenbloom (referred to as a “smut merchant”) and the confiscation of “allegedly” or “reportedly” obscene material. Some two weeks later it reported that unnamed publishers and a distributor (“girlie-book peddlers”) had brought suit seeking an injunction against prosecutorial enforcement and comment upon “the smut literature racket.” *Id.* at 34-35.

64. *Id.* at 43. Justice Brennan announced the judgment of the Court and delivered an opinion that was joined by Chief Justice Warren and Justice Blackmun. Justice White concurred in the judgment and would have permitted the media to report, subject to the *New York Times* standard, the actions of public officials, without regard to its effect upon the reputation of a private person who is involved. *Id.* at 62. Justice Black would have held that absolute privilege would apply to all matters of public or general concern published by the media. *Id.* at 57 (Black, J., concurring). Justices Harlan, Marshall, and Stewart dissented, and would have held that a private person would not be subject to the *New York Times* standard, but would have to prove some fault, other than simple falsity, on the part of the publisher. *Id.* at 64, 69, 86-87. Justice Douglas did not participate.

65. *Id.* at 50-51.

general interest.⁶⁶ This question, however, was soon to be discussed in the case of *Gertz v. Robert Welch, Inc.*⁶⁷

In *Gertz*, the Supreme Court repudiated the plurality opinion of *Rosenbloom*.⁶⁸ The reasoning was that a private person is less able to counteract false statements and thus needs more protection from the media than does a public official or figure.⁶⁹ Therefore, the Court adopted the standard for media libel of a private person that had been proposed by Justice Harlan in *Rosenbloom*,⁷⁰ and held that the states could determine for themselves any media libel standard they wished. The sole exception was a strict liability standard, which did not comport with the constitutional protections afforded speech and press.⁷¹ The statements alleged to be libelous, however, must still be such that substantial damage to reputation was apparent.⁷² False ideas or comments are constitutionally protected and could not be the basis of a libel action.⁷³ False statements of fact, while not in themselves protected by the constitution, may sometimes be so protected in order to avoid media self-censorship.⁷⁴ As further protection of the constitutional rights of the media, the Court ruled that punitive damages may not be recovered unless the plaintiff showed knowledge of falsity or

66. *Id.* at 44 n.12. *See also id.* at 48 n.17.

67. 418 U.S. 323 (1974). *Gertz* claimed that the defendant's magazine published statements that he had a criminal record and was a "Leninist," which allegations were false.

68. *Id.* at 345-46.

69. *Id.* at 344-45.

70. *See note 64 supra.* Justice Powell delivered the opinion of the Court which was joined by Justices Marshall, Rehnquist, and Stewart. Justice Blackmun joined the Court's opinion, primarily to create a majority. 418 U.S. at 354. Chief Justice Burger dissented in a cryptic opinion. *Id.* Justice Douglas dissented on the ground that absolute privilege prevented the imposition of liability upon a publisher who discusses "public affairs." *Id.* at 355. Justice Brennan dissented and would have adhered to the *Rosenbloom* test. *Id.* at 361. Justice White would have allowed the states to impose any standard they wished, including strict liability. *Id.* at 369-70 (White, J., dissenting).

71. *Id.* at 346-47. While many of the justices felt that this strict liability exception would give rise to a negligence standard at the minimum, *see id.* at 353 (Blackmun, J., concurring), 355 (Burger, C.J., dissenting), 360 (Douglas, J., dissenting), 361 (Brennan, J., dissenting), 376 (White, J., dissenting), it was clear by that term's omission in the Court's opinion that the constitutional protections provided only an upper limit by proscribing strict liability. *See also* the dissenting opinions of Justices Harlan and Marshall in *Rosenbloom*, 403 U.S. at 86 n.12.

72. 418 U.S. at 348. The Court indicated that the holding might be different if liability was to be based on a statement that did not warn a reasonable publisher of its defamatory potential. *Id.* In this instance, Justice White believed that the *New York Times* standard would apply. *Id.* at 389 n.27 (White, J., dissenting).

73. *Id.* at 339.

74. *Id.* at 340-41.

reckless disregard for the truth,⁷⁵ and that the recovery of reputational damages must be based upon "competent evidence."⁷⁶

The Court also delineated the boundaries of the term "private person" as one who is not a public official or public figure. Thus, by process of elimination, the status of the plaintiff determines the standard to be followed.⁷⁷ After stating the general definition of public persons,⁷⁸ the Court determined that a person could be a public figure for all purposes or for only some issues.⁷⁹ Total public-figure status must be shown by "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society."⁸⁰ Partial public figure status is determined by an examination of "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."⁸¹ This could be accomplished by either voluntarily thrusting oneself into the vortex of the issue, or by involuntarily being drawn into it.⁸²

Thus, the constitutional protections first articulated in *New York Times Co. v. Sullivan*,⁸³ which effectively required public official plaintiffs in media libel actions to overcome affirmatively common-law privileges,⁸⁴ have now apparently brought along with them the abandonment of libel per se for all persons, including private individuals.⁸⁵ This constitutional standard now requires private-person plaintiffs in media libel actions to prove that the defamatory statements made regarding the plaintiff were false,⁸⁶ that the statements were such

75. *Id.* at 349.

76. *Id.* at 350.

77. *Id.* at 344.

78. Public persons are "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office." *Id.* at 342. See text accompanying notes 46 & 50-51 *supra*.

79. *Id.* at 351. In a typical media libel action, it would be likely that the plaintiff would allege his private-person status and the media defendant would have the burden to allege and prove the public-person status, perhaps in a motion for partial or full summary judgment pursuant to Federal Rule 56. See *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

80. 418 U.S. at 352.

81. *Id.*

82. *Id.* at 345.

83. 376 U.S. 254 (1964).

84. See text accompanying notes 30-37 *supra*.

85. Although *Gertz* was a retreat in some respects from *Rosenbloom*, this author does not feel that the pendulum will be swinging towards a restriction upon the constitutional protections as presently formulated.

86. See note 41 *supra*. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975) (Powell, J., concurring).

as to warn the publisher of their defamatory possibilities, and that the media defendant was at fault in publishing the statements.

It is the varied applications of this fault standard by the states that now must be examined to illustrate the need for a new choice-of-law formulation.

Current State Libel Fault Standards and Their Applications

It is clear from the holding of *Gertz* that any fault standard except strict liability is constitutionally permissible in private-person libel suits against the media,⁸⁷ and that a different level of fault finding could be established by each state.⁸⁸ Although not all states have clarified their standards since *Gertz*, three standards of fault have been established by the states to satisfy the constitutional mandate—negligence, gross irresponsibility, and actual malice.

Negligence Standard

The negligence standard would appear to be the minimum fault standard that the Supreme Court would constitutionally permit to be applied.⁸⁹ To date, a negligence standard has been adopted or suggested for adoption in at least twenty jurisdictions.⁹⁰ These jurisdictions generally provide that a media defendant would be negligent if it failed to investigate properly an apparently defamatory statement. The need for a proper investigation depends upon the source of the information, its reliability, and the time pressures involved in the publication process. Moreover, the media defendant could also be negligent for failing to realize the defamatory capability of the statement. In addition to the criteria established by these jurisdictions, some guidance can be obtained from the Supreme Court's 1976 opinion in *Time, Inc. v. Firestone*.⁹¹

Time, a weekly magazine, had published a notice that indicated that the Firestones had been divorced on grounds of extreme cruelty and adultery, when in fact the ground had been "lack of domestica-

87. 418 U.S. at 347 n.10.

88. *Id.* at 350; see *Time, Inc. v. Firestone*, 424 U.S. 448, 464 (1976) (Powell, J., concurring).

89. Although not specifically stated, a majority of the *Gertz* Court spoke approvingly of a negligence standard. See note 71 *supra*.

90. See Appendix *infra*.

91. 424 U.S. 448 (1976).

tion."⁹² The notice was written by three people in the New York headquarters. After receiving some initial information from an Associated Press dispatch and a *New York Daily News* special bulletin, the New York office sent an inquiry to its Miami bureau. In response to the request, the head of *Time's* Miami office dispatched excerpts from the court's opinion that strongly suggested adultery. A local stringer, not an employee of *Time*, provided similar information. Believing both people read the opinion directly, the New York staff wrote, edited, and checked the notice.⁹³

Time asserted, initially, that Mrs. Firestone was a public figure, but was rebuffed on that point.⁹⁴ Similarly, a complete privilege for the reporting of judicial proceedings, no matter how incomplete or inaccurate, was rejected.⁹⁵ The only remaining question was whether *Time* was at fault for misinterpreting an admittedly "ambiguous" court order. The Court remanded the case for a decision on the fault of *Time*, with four members of the Court concluding that the facts of the case as presented in the record did not amount to negligence sufficient to meet constitutional principles.⁹⁶ Thus, failure to show that the media defendant acted unreasonably in writing, researching, or printing a statement would preclude a finding of negligence.

While the factors discussed in *Firestone* may be clear and concise, as may be the standards of the various jurisdictions discussed above,⁹⁷ the application of these criteria shows a disparity requiring a choice of law framework. Though the *Firestone* decision indicates that reliance upon a newspaper story and an ambiguous court order would not amount to negligence, other courts could hold that a finding of negligence is not precluded.⁹⁸ While some jurisdictions would hold that the media cannot be negligent in relying upon and publishing information

92. *Id.* at 458. This ground for divorce was not previously recognized by Florida law. *Id.*

93. *Id.* at 451-52, 466-67 & n.5, 468 & n.7.

94. *Id.* at 455. Voluntary use of the courts could not raise a private person to public figure status, even if press conferences were given in connection with the litigation. *Id.* at 454.

95. *Id.* at 457.

96. *Id.* at 470 n.9 (Powell, J., joined by Stewart, J., concurring), 474, 479-81 (Brennan, J., dissenting), 491-93 (Marshall, J., dissenting). Justices Blackmun and Rehnquist and Chief Justice Burger did not find any lower court determination of fault, although they clearly looked for it. *Id.* at 461-64. Justice White found negligence. *Id.* at 484 (White, J., dissenting). The Florida intermediate appellate court had held that there was no proof of negligence. *Firestone v. Time, Inc.*, 254 So. 2d 386, 390 (Fla. Dist. Ct. App. 1971), *rev'd*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976).

97. See Appendix *infra*.

98. See, e.g., Hawaii and Oklahoma, Appendix *infra*.

obtained from police reports,⁹⁹ others hold that there is a need for further investigation.¹⁰⁰ Similarly, reliance upon a public official's statements has been held to bar negligence¹⁰¹ or to present a negligence question.¹⁰²

More important, however, is the level of negligence to be applied to the media defendant. The *Restatement (Second) of Torts* section 580B¹⁰³ provides that the media defendant is to be held to the skill and experience normally possessed by the profession,¹⁰⁴ a form of "journalistic malpractice."¹⁰⁵ Expert testimony would normally be necessary to establish the custom of the profession.¹⁰⁶ Six jurisdictions apply this test by specific reference,¹⁰⁷ and three others by similar language.¹⁰⁸ While section 580B might imply the application of an industry-wide standard to national media,¹⁰⁹ some courts apply a local standard.¹¹⁰

On the other hand, at least six jurisdictions apply a reasonable-person standard to the media.¹¹¹ The considerations in these jurisdictions revolve around matters unrelated to the need for publishing, press-time limitations and standards in the industry; rather, the test is whether a reasonably prudent person would have published the statement under similar circumstances. This conflict between jurisdictional levels of negligence, coupled with the conflict in negligence criteria, shows the great need for a choice-of-law formulation.

99. See, e.g., Louisiana, North Carolina and Pennsylvania, Appendix *infra*.

100. See, e.g., Connecticut and District of Columbia, Appendix *infra*.

101. See, e.g., Florida and Pennsylvania, Appendix *infra*.

102. See, e.g., Kansas and Massachusetts, Appendix *infra*.

103. RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975) states:

“§ 580B. *Defamation of Private Person*

“One who publishes a false and defamatory communication concerning a private person, or concerning a public official or a public figure in relation to a private matter, is subject to liability, if, but only if, he

“(a) knows that the statement is false and that it defames the other,

“(b) acts in reckless disregard of these matters, or

“(c) acts negligently in failing to ascertain them.”

104. *Id.* Comment f, at 32.

105. This term was used by the Florida Supreme Court in *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976).

106. RESTATEMENT (SECOND) OF TORTS § 580B, Comment f, at 32 (Tent. Draft No. 21, 1975).

107. See Arizona, Hawaii, Maryland, Massachusetts, Missouri and Texas, Appendix *infra*.

108. See Connecticut, Kansas and Oklahoma, Appendix *infra*.

109. RESTATEMENT (SECOND) OF TORTS § 580B, Comment f, at 32 (Tent. Draft No. 21, 1975).

110. See, e.g., Kansas, Appendix *infra*.

111. See, e.g., Illinois, Iowa, Louisiana, Ohio, South Dakota and Washington, Appendix *infra*.

Gross Irresponsibility Standard

The second category of fault established since the *Gertz* decision is that of gross irresponsibility. The only jurisdiction to adopt this standard is New York in *Chapadeau v. Utica Observer-Dispatch, Inc.*,¹¹² where the court of appeals ruled that if the content of the statement is of legitimate public concern warranting public comment, a private party must prove that the media defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."¹¹³ Chapadeau, who was arrested on a separate drug charge, claimed to have been libeled by a statement linking him with two persons arrested for drug violations at a party. The court held that typographical errors were inevitable and that the investigation by three separate people after consultation with two authoritative sources indicated reasonable methods to insure accuracy.¹¹⁴

This fault standard was again discussed in *Commercial Programming Unlimited v. Columbia Broadcasting Systems, Inc.*¹¹⁵ The plaintiff complained that CBS had libeled it by distorting certain public official's comments about it, making false statements while knowing them to be false, and failing to investigate properly. Under the facts of the case, the court held that not only was the lower court incorrect in determining that the evidence was insufficient to show actual malice, but that the evidence was also sufficient to create a triable issue of gross irresponsibility.¹¹⁶

Actual Malice Standard

The third type of fault standard established to date is that of actual malice. At least four jurisdictions have adopted or have been urged to adopt this standard.¹¹⁷ These jurisdictions would hold, generally, that

112. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

113. *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. It is interesting to note the similarity of this language to Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967): "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." See note 52 *supra*.

114. 38 N.Y.2d at 200, 341 N.E.2d at 571-72, 379 N.Y.S.2d at 64-65.

115. 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1975).

116. *Id.* at 354, 378 N.Y.S.2d at 72.

117. These jurisdictions and the authorities are:

Colorado: *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975). A reporter wrote a series of three articles based upon information he obtained from the police, the district attorney, a private citizen and the plaintiffs. His publisher, however, printed headlines and letters to the editor that were highly critical and

in matters of public interest or concern,¹¹⁸ liability could not be imposed upon the media for false statements unless it was shown that the defendant knew the statement was false or made the statement with reckless disregard of whether it was true or not. This standard is the same as that announced in *Rosenbloom*.¹¹⁹ Despite the fact that only a few jurisdictions have adopted this standard, there are some differences in the applications of the standard. Within these jurisdictions, for example, two states would require a finding that the media defendant had serious doubts about the truth of the statements,¹²⁰ while another would not.¹²¹ Furthermore, when cases of these jurisdictions are compared with those of other jurisdictions involving public figures, officials and pre-*Gertz* private persons, the holdings indicate a lack of uniformity in the application of the standard. For example, while one jurisdiction held that publication by the media of defamatory material submitted to the newspaper by a private individual would satisfy a

derogatory of the plaintiffs. The court held that the reporter was not liable, but that the publisher was, having printed the letters with reckless disregard as to whether or not they were true. The standard to be applied was the *Rosenbloom* test, see text accompanying notes 63-65 *supra*, but without the requirement that the person making the statement shall be shown to have had serious doubts as to the truth of the statement, as adopted in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). See text accompanying note 55 *supra*.

Indiana: *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976). The defendant published a series of ten articles about the plaintiff's involvement in the case of a house fire. It based the articles on information received from fire officials and from evidence presented at a licensing board hearing which resulted in plaintiff's suspension. Noting that defendant's reporters may have failed to examine or interpret correctly the fire department report, the court determined that there was no evidence to support a finding of actual malice under either the *Rosenbloom* or *St. Amant* criteria.

Utah: *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222 (Utah 1976). Although discussing the question of privilege to publish matters in the public interest relating to a private person, the court noted with approval the decision of the Colorado Supreme Court in *Walker*, *supra*. The court held that summary judgment was proper where there was no evidence of any malice.

Vermont: One commentator has suggested the adoption of the actual malice standard in Vermont. Harlow, *Proposed Standards of Liability in Defamation and Privacy Actions Brought by Private Individuals Against the News Media*, Vermont Bar Newsletter, Jan. 1977, at 8. The current standard on public interest statement follows *Rosenbloom*. See *Michlin v. Roberts*, 132 Vt. 154, 318 A.2d 163 (1974).

118. No jurisdictions to date have discussed whether the actual-malice standard would be applied to media defendants publishing statements that are not related to matters of public interest or concern. It could be assumed, based upon the specificity of the holdings in the cases cited in note 117 *supra*, that these statements would be judged by a lesser standard.

119. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). See text accompanying notes 62-66 *supra*.

120. See *Indiana* and *Vermont*, note 117 *supra*.

121. See *Colorado*, note 117 *supra*.

finding of actual malice,¹²² two other jurisdictions would not.¹²³

In addition to the various applications of the three standards, a particular case may involve the application of more than one standard. For example, a plaintiff from a negligence standard jurisdiction could bring a libel action against a media defendant from a gross-irresponsibility jurisdiction who publishes the statements in both jurisdictions.¹²⁴ In another case, a plaintiff from a jurisdiction that would apply an actual-malice standard wishes to sue a media defendant who operated in a negligence¹²⁵ or gross-irresponsibility¹²⁶ jurisdiction. Any number of permutations and combinations can be anticipated on the basis of three standards and variations within each standard. It is with this in mind that a choice of law formulation must be devised to readily determine which jurisdiction's law should be applied in a particular case.

A Proposed Choice of Law Framework

The American common law of libel was historically concerned with the interests of the individual who was defamed rather than the alleged defamer. Under this approach, choice of law questions, when presented, usually revolved around the ability of the plaintiff to enforce his or her remedy. The cases involving this choice of law problem concerned the application of different statutes of limitations,¹²⁷ statutes regarding the need for a retraction,¹²⁸ or principles of privilege.¹²⁹ The

122. *Id.*

123. In *Cera v. Gannett Co.*, 47 App. Div. 2d 797, 365 N.Y.S.2d 99 (1975), the court held that actual malice could not be proved, despite the defendant's publishing letters which called the plaintiffs "four cultists who call themselves chiropractors" when in fact they were licensed chiropractors. In *Menendez v. Key West Newspaper Corp.*, 293 So. 2d 751 (Fla. Dist. Ct. App. 1974), the defendant published a derogatory advertisement submitted by named individuals in opposition to the plaintiff, a political candidate. The court held that this action did not amount to actual malice.

124. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976).

125. See, e.g., *Fadell v. Minneapolis Star & Tribune Co.*, 425 F. Supp. 1075 (N.D. Ind. 1976).

126. See, e.g., *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977).

127. See, e.g., *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948).

128. See, e.g., *Hanley v. Tribune Publishing Co.*, 527 F.2d 68 (9th Cir. 1975).

129. The first *Restatement of Conflict of Laws* § 382 precluded liability of a person who acted pursuant to a privilege allowed by the jurisdiction where the action took place. Notwithstanding this formulation, many jurisdictions either accepted or rejected foreign and domestic privileges for a variety of reasons. Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 LAW & CONTEMP. PROB. 85 (Spring 1977).

general choice of law rules initially applied the law of the forum,¹³⁰ but this policy was gradually replaced by the law of the place of wrong.¹³¹ The place of wrong was where the last occurrence necessary to create liability on the part of the actor took place.¹³²

In the libel context, the place of wrong was where the defamatory statement was received by a third person, regardless of the place of broadcasting.¹³³ This formulation, however, permitted separate and distinct causes of action for each hearing or reading of the statement. This "multiple publication" rule¹³⁴ was replaced in some jurisdictions by the "single publication rule" which required that all causes of action and requests for damages be consolidated in one case based upon the original publication.¹³⁵ Since most cases were brought in the jurisdiction where the publication occurred, the law of the forum was often applied, regardless of whether or not it was the proper law.¹³⁶

The general choice of law rules eventually came to be embodied in the "most significant relationship" or "center of gravity" test as formulated by the American Law Institute in the second conflicts Restatement.¹³⁷ Section 150 concerns the subject of interstate libel and provides that the "rights and liabilities that arise from defamatory matter in . . . [an] aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties."¹³⁸ Generally the items to be considered under this test include the place of injury, the place of conduct, the place of the relationship, and the domicile, residence or other situs of the parties.¹³⁹ In the context of interstate media libel of a private person, the person's domicile usually has the most significant relationship to the occurrence, so long as the statement was published there.¹⁴⁰ If the statement was published elsewhere, the

130. *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774).

131. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

132. *Id.* § 377.

133. *Id.* Illustration 7, at 457.

134. See *Interstate Publication*, *supra* note 8, at 960-62.

135. *Id.* at 962-71. See also LEFLAR, AMERICAN CONFLICTS LAW § 137, at 334-35 (1968) [hereinafter cited as LEFLAR]. See note 144 *infra*.

136. *Interstate Publication*, *supra* note 8, at 977; LEFLAR, *supra* note 135, at 338.

137. Other tests include analysis of governmental interests, dominant contacts, principles of preference, choice influencing considerations and preference for the forum's law. See Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROB. 10, 11 (Spring 1977).

138. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(1) (1971).

139. *Id.* § 145.

140. *Id.* § 150(2).

law of the plaintiff's domicile still controls, unless another jurisdiction has a more significant relationship.¹⁴¹

It is important to note that actions of the defendant other than "assembling, printing and distributing" are not of sufficient importance upon which to base a significant relationship.¹⁴² Moreover, it is said that the place of the defendant's actions is "of less significance" in interstate media libel situations.¹⁴³ The rationale behind this formulation is that the interests of the person's reputation are paramount and that recourse to damages for the loss of reputation should be assisted; a domicile-oriented rule promotes "certainty, predictability and uniformity of result and . . . ease in the determination and application of the applicable law."¹⁴⁴

Unfortunately, this *Restatement* formulation has proven to be obsolete. Pursuant to the direction of the United States Supreme Court, the focus on the person's reputation is no longer the most important consideration; now, the inspection must revolve around the actions of the defendant to see if it committed any fault.¹⁴⁵ While it may be easy to change the *Restatement* preference for the plaintiff's domicile to the defendant's activity situs, this change would not be sufficient. It would still permit a court to determine that the usual significant relationship of activity situs could be outweighed by some other relationship based on reputation. Under the constitutional principles provided, the extent of the statement's effect on the person's reputation is irrelevant to the issue of fault.¹⁴⁶ Accordingly, the only formulation for determining the existence or nonexistence of the defendant's fault that could be constitutionally permissible must be by reference to the place of the defendant's actions.

The concept of applying the law of the jurisdiction where the acts of the defendant occurred is not a new one. Indeed, it was suggested almost twenty-five years before *Gertz* by Professor Albert

141. *Id.* § 150, Comment e, at 458-59.

142. *Id.* § 150, Comment e, at 459.

143. *Id.* § 145, Comment e, at 420.

144. *Id.* § 150, Comment b, at 455. The second conflicts *Restatement* would also adopt the "single publication rule" for choice of law principles, see text accompanying note 135 *supra*, and would apply one law to all jurisdictions. The law to be applied would be that of the one state with the most significant relationship regardless of whether that state had adopted the single publication rule. *Id.* § 150, Comment c at 456-57. The more places of publication there are, the less significant the relationship, thus leaving only the domicile's relationship as the most significant.

145. See text accompanying notes 25-86 *supra*.

146. See text accompanying note 86 *supra*. The statement's effect on the person's reputation may, however, be relevant to part of the issue of actual malice.

Ehrenzweig.¹⁴⁷ He reasoned that liability without fault required a focus on compensation, but liability based on fault concerned itself with admonition of the defendant, and others like it, to not act in a similar way; therefore, the law of the place of acting should remain as the controlling authority in negligence actions brought as a result of the defendant's "moral" fault.¹⁴⁸ In the media libel context, Professor Ehrenzweig noted the lack of assistance of the first conflicts Restatement's "place 'where the defamatory statement is communicated,'"¹⁴⁹ and concluded that the law of the place of the defendant's conduct should be applied.¹⁵⁰ Other commentators have referred to this choice-of-law formulation but have not recommended it.¹⁵¹ In light of the new constitutional requirements, such a formulation appears mandatory, yet some inspection as to its utility should be made.

According to the cases construing the constitutional requirement of fault,¹⁵² the actions of a media defendant that could be considered fault-worthy are investigation, writing, editing, and printing.¹⁵³ Each of these activities occur within a single known jurisdiction. The only possible exception is multistate investigation, but still the jurisdictions are finite. Thus, both the plaintiff and the defendant know, or can easily ascertain, the location of each of the activities that are claimed to be faulty. By choosing to operate in a particular jurisdiction a media defendant will be able to determine, prior to acting, the standard to be applied to its conduct. Similarly, a plaintiff can know what he or she must prove to establish fault. Thus, the goals of certainty, predictability, uniformity of result, and ease in determining the correct standard¹⁵⁴ are all accomplished in a cohesive way.

One may say that this formulation would encourage the media to center its writing, editing, and printing in a jurisdiction with either a gross-irresponsibility or actual-malice standard. While this may be possible with a national organization, it will likely be infeasible for lo-

147. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951).

148. *Id.* at 1-3.

149. See text accompanying note 133 *supra*.

150. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 34, 49 (1951).

151. See, e.g., *Interstate Publication*, *supra* note 134, at 974-75; LEFLAR, *supra* note 135, at 335-37.

152. See notes 90, 117 & text accompanying notes 112-16 *supra*.

153. Some courts have spoken of the inevitability of typographical errors, but for the purposes of this discussion printing will be included. See, e.g., *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

154. See text accompanying note 144 *supra*.

cal or regional media to relocate for the sole purpose of utilizing a higher standard of liability. As to the investigation done by the media, whether local, regional, or national, it will occur at the place of newsgathering. Thus a claim based upon faulty investigation is subject to the vagaries of the newsgathering process.

Another criticism of this approach might be that it may inject into a particular action different standards to be applied to different actions of the media defendant. While this is certainly possible, it is unlikely that a claim would assert all four activities as faulty; at most, the normal suit would involve faulty investigation and either writing or editing. Nevertheless, if suit was brought claiming fault in all four activities, the liability of the media defendant could be predicated upon the jury's finding fault based upon any activity that violated its corresponding standard, assuming that *respondeat superior* would apply to the case.¹⁵⁵ If that doctrine did not apply, then at most only two activities—investigation and writing or editing and printing—would be present in any case, and that should not be too burdensome.

One valid criticism of the proposed formulation that could exist concerns an investigation process that might encompass more than one jurisdiction. Even in that situation, however, the activity which is allegedly faulty is usually the failure to investigate properly the existence or nonexistence of a certain fact. The place where that fact was ascertainable is usually known and thus provides a standard to be applied. The plaintiff's burden of proof would then include the requirement of showing that the activity within the least-restrictive-jurisdiction was faulty, most likely by showing that a proper investigation would have discovered or eliminated the fact in question.

The proposed choice-of-law formulation, requiring application of the law of the place of the defendant's conduct, would affect or change pending and past decisions. The most obvious of these cases is *Time, Inc. v. Firestone*,¹⁵⁶ wherein a Florida resident was allegedly libeled by a magazine article authored by three people in New York.¹⁵⁷ This group received information from various sources, and, through its staff, requested information about Mrs. Firestone's divorce; they did not,

155. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 (1974).

156. 424 U.S. 448 (1976). See text accompanying notes 91-96 *supra*. It is interesting to note that, after a circuitous remand to the trial court, Mrs. Firestone decided to recall her lawsuit; a notice of dismissal was filed on September 1, 1978. Letter to author from Harry M. Johnston, Assistant General Counsel, Time, Inc. (Jan. 4, 1979).

157. 424 U.S. 448, 467 n.5 (1976)(Powell, J., concurring).

however, read the court's decision.¹⁵⁸ While the case was remanded for further consideration of fault, it was clear that at least four judges felt that no negligence was present,¹⁵⁹ as may be required by the Florida standard.¹⁶⁰ Since the allegedly faulty activities occurred in New York, the proposed choice of law rule would apply that state's standard of gross irresponsibility.¹⁶¹ Under this higher standard, at least one more judge might well have held that *Time* was not at fault.¹⁶²

In another case, *Ryder v. Time, Inc.*,¹⁶³ a Virginia lawyer brought a libel action on the ground that he was damaged by *Time*'s publication of a story concerning a suspended attorney with the same first and last name but with a different middle initial. Ryder claimed that the failure to include the proper initial caused some people to believe he was the suspended lawyer. After ruling that Ryder was not a public official or public figure, the court remanded the case for a determination of the status of Virginia libel law.¹⁶⁴ It is again clear that the *Time* story was written and investigated in New York and based upon a reported decision. As such, the New York standard should be applied rather than the Virginia standard.¹⁶⁵

In *Dixon v. Newsweek, Inc.*,¹⁶⁶ a Colorado resident brought suit alleging that he was libeled by the defendant's report of his dismissal from a post with Frontier Airlines. The court applied an actual malice standard pursuant to Colorado law,¹⁶⁷ despite the claim that the writer's actions may have occurred elsewhere. The court simply ruled that "Colorado law controls in this case."¹⁶⁸ In another case, the court in *Trans World Accounts, Inc. v. Associated Press*¹⁶⁹ indicated that had it found the plaintiff to be a nonpublic figure it would have imposed a California standard upon the AP which wrote a story in Washington, D.C. based upon a Federal Trade Commission press release. Similarly,

158. *Id.* at 459 n.5.

159. See note 96 *supra*.

160. See Florida, Appendix *infra*.

161. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). See text accompanying notes 112-14 *supra*.

162. See note 96 *supra*.

163. 557 F.2d 824 (D.C. Cir. 1976).

164. *Id.* at 826 n.4.

165. The court apparently felt that the Virginia standard is likely to be based upon negligence: "A modicum of care would have provided the correct identity." *Id.* at 826.

166. 562 F.2d 626 (10th Cir. 1977).

167. See Colorado, note 117 *supra*.

168. 562 F.2d at 629. A different result would not have occurred in this case if the proposed choice of law formulation was applied, as the court found that actual malice was proven.

169. 425 F. Supp. 814 (N.D. Cal. 1977).

the court in *Drotzmanns, Inc. v. McGraw-Hill, Inc.*¹⁷⁰ applied South Dakota law, the state of plaintiff's place of business, without considering the location of the defendant's actions in writing and publishing a story that may have been negligently libelous.

One other decision bears mention, primarily because the court noted the choice of law question and proceeded to answer it. In *Snead v. Forbes, Inc.*,¹⁷¹ the plaintiff was a former president of Consolidated Freightways, a national trucking business. He alleged that he was libeled by a reference to his presidency in the defendant's nationally distributed business magazine, published in New York. More particularly, he alleged that statements in two articles imputed to him an inability to perform the duties of a professional business executive. The court determined that the law of the plaintiff's domicile (Illinois) would be applied to the question of the existence of a defamatory statement, citing the second conflicts Restatement.¹⁷² This case was so decided despite the existence of New York's plaintiff-oriented "innocent construction rule," which permitted the statement to be defamatory. Although the plaintiff was not a public official or a public figure, the court held that the subject matter of the article was of public interest and concern. It further held that libel was not proven under the Illinois standard utilized. Such a decision seems ironic today, in that Illinois would apply the easier negligence standard to this case, while New York would adopt a more restrictive gross-irresponsibility test.¹⁷³

On the basis of these cases, it is clear that a change in the choice of law formulation would have widespread implications and effects. The format of this new rule must be one that will make obvious both the formula and the appropriate law to be applied. It is to this possible formulation that attention is now directed.

Proposals for a New Choice of Law Rule

There are four possible methods to establish the new choice of law rule requiring the application of the law of the place where the interstate media defendant's libelous acts have occurred. The first method would be simply to allow the courts, on a case-by-case basis, to apply the formulation. This method, however, leaves too much freedom to

170. 500 F.2d 830 (8th Cir. 1974).

171. 2 Ill. App. 3d 22, 275 N.E.2d 746 (1971).

172. 2 Ill. App. 3d at 26, 275 N.E.2d at 749 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 (2) (1971)). See text accompanying notes 137-44 *supra*.

173. Compare Illinois, Appendix *infra*, and New York, text accompanying notes 112-14 *supra*.

an individual court to disregard the constitutional mandate requiring the new rule. It also does not assist the litigation objective of determining at an early date in the controversy the law to be applied to the case. The method would require the ultimate appellate court in each jurisdiction to be the final word on the rule, with the lower courts being reluctant to change the then-present choice of law formulation. This process would involve greater costs, at least in the initial lawsuit, for appeals to that ultimate appellate court. Moreover, it would require that there be at least one lawsuit involving interstate media libel in each jurisdiction before the rule is established, a situation that may not be forthcoming.¹⁷⁴ Accordingly, allowing the courts to apply the rule on an *ad hoc* basis would not be the most efficient, orderly, and predictable method to follow.

The second method of establishing the choice of law rule would be for the American Law Institute to amend the second conflicts Restatement. As stated above,¹⁷⁵ the *Restatement* utilizes the significant relationship test, but has determined that the law of the plaintiff's domicile usually has the most significant relationship to the lawsuit.¹⁷⁶ This determination could be easily changed by amending section 150 to read as follows:¹⁷⁷

§ 150. Multistate Defamation.

(1) The rights of a *plaintiff* [and liabilities] that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.

(4) *The liabilities of the defendant that may arise from defama-*

174. Not all of the jurisdictions have yet adopted tests for fault. For each jurisdiction to establish not only its own fault standard, but also this choice of law rule, the time involved is likely to be much longer than the period from *Gertz* to the present.

175. See text accompanying notes 138-44 *supra*.

176. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 150(2) & Comment e, at 458-59 (1971).

177. The deleted material is in brackets; the added material is italicized.

tory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture or similar aggregate communication are to be determined according to the standards established by the local law of the state where the particular actions claimed to be fault-producing had their occurrence.

Similarly, the comments describing section 150 would also have to be amended to delete the reference to liabilities and include another comment explaining the need for the new subsection.

Although this method is preferable to the one first stated, it still does not accomplish the objectives of efficiency, order, and predictability. The *Restatement* is not governing law in all jurisdictions. To some courts it is merely a guidepost that provides justification for determining a particular issue in a certain way. To others, it is only advisory, as the American Law Institute does not control the individual jurisdictions; these courts can adopt or reject the formulation. Additionally, the necessity for court approval and adoption of the rule implies the use of the appellate process, with the detriments stated above.¹⁷⁸

A better method would be the adoption by the individual legislative bodies of a uniform law governing interstate-libel choice of law.¹⁷⁹ This uniform law could be proposed by the National Conference of Commissioners on Uniform State Laws.¹⁸⁰ Unless the uniform law would be adopted in all of the jurisdictions, however, it would also be subject to the same degree of unpredictability, inefficiency, and disorder as the two other methods. Although some uniform acts have been adopted in many jurisdictions¹⁸¹ other uniform acts have not been so successfully received.¹⁸²

The optimum method for applying the rule would be the adoption by Congress of a federal law concerning interstate-libel choice of

178. See text accompanying note 174 *supra*.

179. See Note, *The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem*, 60 HARV. L. REV. 941, 951 (1947).

180. This would not be the first time that the National Conference of Commissioners on Uniform State Laws discussed the concept of interstate libel. In September, 1952, the Uniform Single Publication Act was proposed and adopted by the Conference. *Interstate Publication*, *supra* note 8, at 993-94. This act has been adopted by the *Restatement (Second) of Conflicts of Law* § 150, see note 144 *supra*, as well as various states, see, e.g., ARIZ. REV. STAT. § 12-651 (1956); ILL. ANN. STAT. ch. 126 §§ 11-15 (Smith-Hurd 1973); PA. STAT. ANN. tit. 12, §§ 2090.1-2090.5 (Purdon 1967).

181. See, e.g., the Anatomical Gift Act (1968), Gifts to Minors Act (1956, 1965, 1966), and Uniform Commercial Code (1951, 1957, 1962, 1966). 1976 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 284-87.

182. See, e.g., Certification of Questions of Law Act (1967), Interstate and International Procedure Act (1962), Public Assembly Act (1972), and Status of Convicted Persons Act (1964). *Id.*

law.¹⁸³ It is clear that such legislation could be based upon the interstate commerce clause¹⁸⁴ or the full faith and credit clause,¹⁸⁵ which have permitted Congress to regulate tort liability.¹⁸⁶ The courts have also determined that federal law can be applied to libel by telegraph¹⁸⁷ and radio.¹⁸⁸ Accordingly, it would seem entirely proper for Congress to legislate in this area. Other countries have established national laws concerning libel,¹⁸⁹ and still others have had national laws proposed and considered.¹⁹⁰ Such legislation would provide one law that would apply to all interstate media-libel actions in either federal or state court. It would also provide the efficiency, order, and predictability that is required under the circumstances.

A proposed federal law (or with slight modification a uniform law) might take the following form:¹⁹¹

A BILL

To add Chapter 60 to Title 15 of the United States Code for the purpose of providing a choice of law rule in interstate media libel lawsuits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled,

Sec. 1. This Act may be cited as the "Interstate Media Libel Choice of Law Act."

Sec. 2. 15 U.S.C. § 3301 is added to read:

§ 3301. *Declaration of Policy.* In the interest of maintaining the ability of the media to investigate and report information to the public, it is hereby declared to be the public policy of the United States to insure that the public and the media are able to predict the standard upon which fault in

183. A federal choice of law statute was proposed in 1950 and would have generally required application of the law of the state to which the person was subject at the time of the conduct, usually the law where the person was physically present at that time. Stimson, *Simplifying the Conflict of Laws: A Bill Proposed for Enactment by the Congress*, 36 A.B.A.J. 1003 (1950).

184. U.S. CONST. art. I, § 8, cl. 3.

185. *Id.* art. IV, § 1.

186. For example, the Federal Employer's Liability Act, 45 U.S.C. § 51 (1970), applies to all negligence actions against interstate railroads. The act supercedes the state negligence law in that it provides that contributory negligence is not a bar to recovery. *Id.* § 53.

187. See, e.g., *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940).

188. See, e.g., *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

189. See, e.g., the English Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66; the Canadian Uniform Defamation Act, MAN. REV. STAT. c. 60 (1946), ALTA. REV. STAT. c. 87 (1955).

190. See, e.g., Kirby, "The Purest Treasure?" *National Defamation Law Reform in Australia*, 8 FEDERAL L. REV. 113 (1977).

191. This proposed law follows the general format of the Newspaper Preservation Act, 15 U.S.C. § 1801 (1976).

an interstate libel suit, brought by a private person, is to be determined.

Sec. 3. 15 U.S.C. § 3302 is added to read:

§ 3302. *Definitions.* As used in this chapter,

- (1) The term "interstate libel" means any libel or alleged libel which is published or distributed in more than one state.
- (2) The term "libel" means any defamatory statement written, spoken, printed or broadcast about a person or other entity.
- (3) The term "media" means newspaper, radio, television, motion pictures or other mechanical reproduction of a statement.
- (4) The term "private person" means any person or entity, other than a public official, political candidate, or public figure with regard to their public or political actions and qualifications.

Sec. 4. 15 U.S.C. § 3303 is added to read:

§ 3303. *Fault Required.* In all interstate libel actions brought by a private person against a media defendant, liability may not be imposed upon the defendant except upon a showing of fault in the processes of investigation, writing, editing, or printing. The states are permitted to establish for themselves the appropriate fault standard desired to be applied within that state, except that liability without fault may not be imposed.

Sec. 5. 15 U.S.C. § 3304 is added to read:

§ 3304. *Choice of Law.* In all interstate libel actions brought by a private person against a media defendant, the liability of the defendant must be proven in accordance with the law of the jurisdiction where the actions claimed to be faulty took place.

This law would provide for a summary of the law of libel through *Gertz*¹⁹² and would provide the choice of law rule required as a result of the constitutional mandate of *Gertz*.¹⁹³ Adoption by the Congress of this law would still permit each state wide latitude in determining its own fault standard, but would guarantee uniformity and predictability once that standard has been ascertained.¹⁹⁴

Conclusion

Despite being a subject that is "a dismal swamp, filled with quak-

192. See text accompanying notes 25-82 *supra*.

193. See text accompanying notes 146-53 *supra*.

194. This statute is not as far reaching as the law proposed by Judge Wright, who would create a national law governing all aspects of defamation. See Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 648 (1968).

ing quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon,"¹⁹⁵ the question of choice of law is one that must be addressed in the interstate media-libel area. While efforts to "re-revolutionize the law" in this area may be looked upon with disdain,¹⁹⁶ the constitutional mandate, as enunciated by the Supreme Court, requires a fresh look at the subject. Choice of law in the interstate media-libel context must focus upon the acts of the media defendant and must be measured by the fault standards established by the states where those acts took place. The best method of insuring that all courts apply the constitutional mandate is by adopting a federal law governing the choice of law question in interstate media libel suits. Such a law would not inhibit the states in determining their own standards of conduct; each state is permitted to do so. The law, however, would provide the degree of predictability, uniformity, and efficiency necessary for the media to operate in the interstate context. Similarly, it would allow the person who claims to be defamed to know what standard he or she will be held to prove.

It must be noted, finally, that this article has discussed only the choice of law question of a fault standard within the parameters of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*¹⁹⁷ Thus, the application of the proposed framework to the public or private status of the plaintiff¹⁹⁸ or defendant,¹⁹⁹ the defamatory content of the statement,²⁰⁰ the burden of proof and who must carry it,²⁰¹ statutes of limitation,²⁰² privileges,²⁰³ damages,²⁰⁴ defenses,²⁰⁵ or jurisdiction²⁰⁶

195. *Interstate Publication*, *supra* note 8, at 971.

196. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROB. 10 (Spring 1977).

197. 418 U.S. 323 (1974).

198. Reliance upon local fame, notoriety or pervasive involvement in the affairs of society, as well as the involvement in a particular controversy are factors in determining the status of a plaintiff. *Id.* at 351-52. See text accompanying notes 77-82 *supra*.

199. See Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1221-26 (1976); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974).

200. See Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1233-35 (1976). See also *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 501-02 (3d Cir.), *cert. denied*, 99 S. Ct. 181 (1978).

201. See, e.g., Comment, *As Times Go By: Gertz v. Robert Welch, Inc. and Its Effect on California Defamation Law*, 6 PAC. L.J. 565, 582 (1975).

202. See, e.g., Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 216-23 (1976).

203. See, e.g., Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 LAW & CONTEMP. PROB. 85 (Spring 1977). See also *Samuelson v. Susen*, 576 F.2d 546 (3d Cir.

remain for future discussion.

1978); *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3450 (Jan. 9, 1979).

204. *See, e.g.*, Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 *FORDHAM L. REV.* 1382 (1977).

205. *See, e.g.*, *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Hanley v. Tribune Pub. Co.*, 527 F.2d 68 (9th Cir. 1975). *See also* Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion*, 3 *HASTINGS CONST. L.Q.* 363, 369-72 (1976).

206. The concept that a court, which will not be applying its own law, should not assert jurisdiction in a libel case may have some historical basis. In *Buckley v. New York Post Corp.*, 373 F.2d 175, 183 (2d Cir. 1967), Judge Friendly noted the necessity of the "consistency with the First Amendment's objectives" of the state's exercise of jurisdiction. "Putting the matter in a slightly different way, the First Amendment could be regarded as giving forum non conveniens special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." *Id.* at 183-84. The Court in *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977) discussed *Restatement (Second) of Conflict of Laws* § 150 and concluded, in part, that since § 150 implies the use of the law of the place of injury, due process would not be offended by the assertion of jurisdiction. *Id.* at 320-25. Under the framework proposed, the law of the place of the defendant's alleged fault would control. Therefore, this ground, relied on in part by the court in *Anselmi*, might mandate the adoption of Judge Friendly's *forum non conveniens* approach, thus denying jurisdiction.

The Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 215-16 (1977), reaffirms the Court's separation of the questions of jurisdiction and choice of law, but also shows the due process interrelationship between them. *See also* Justice Brennan's concurring and dissenting opinion. *Id.* at 224-26. In speaking of a "fair forum for this litigation," the Court may have adopted Judge Friendly's suggested approach in libel cases. *Id.* at 215. *See also* Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?* 26 *U. KAN. L. REV.* 61, 82 (1977).

Appendix

The negligence jurisdictions and the supporting authorities are:

Arizona: *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977). "Negligence is, of course, conduct which creates an unreasonable risk of harm. It is the failure to use that amount of care which a reasonably prudent person would use under like circumstances. The question . . . is whether the defendants acted reasonably in attempting to discover the truth or falsity or the defamatory character of the publication" The standard set out in *Restatement (Second) of Torts* § 580B, see note 103 *supra*, was expressly adopted. The reporter had published a story based upon the statements of an admittedly biased source, who later denied the statements. Failure to attempt to verify could violate the standard.

Connecticut: *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 356 A.2d 472, 475 (1975). Negligence was defined as "the failure to make a reasonably careful investigation of the facts before publication" according to the standard of "care and vigilance of a prudent and conscientious man wielding the power of the public press." In this case, the reporter based his story on information supplied by a normally reliable police officer but did not do any further checking. The court ruled that a jury question was presented.

District of Columbia: *Phillips v. Evening Star*, 46 U.S.L.W. 2056 (D.C. Super. Ct. June 30, 1977). Reliance upon unofficial statements of the police regarding a crime will not amount to a privilege and may satisfy a negligence standard.

Florida: Despite the finding of "journalistic negligence" by the Florida Supreme Court in *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976), the court did not indicate what fault standard should be applied when it remanded the case. 332 So. 2d 68 (Fla. 1976). In *Helton v. United Press Int'l*, 303 So. 2d 650 (Fla. Dist. Ct. App. 1974), the court stated that, under *Gertz*, plaintiffs were not required to show actual malice. However no lesser fault standard was announced. Apparently willing to take the step, the trial judge in *Karp v. Miami Herald Publishing Co.*, 45 Fla. Supp. 183, 185 (Cir. Ct. 1977) determined that negligence would be the fault standard to be applied. There a reporter who based his story upon a government official's statements, and who unsuccessfully tried to speak to the plaintiffs prior to publication, was found to be not negligent.

Hawaii: *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 536, 543 P.2d 1356, 1366 (1975). Negligence could arise from not having a reasonable ground to believe the statement was true or in publishing it having failed to exercise reasonable care. The standard to be applied would appear to be that of a reasonably prudent publisher, in accordance with *Restatement (Second) of Torts* § 580B, see note 103 *supra*. Reliance upon newspaper reports and memoranda of an employee was insufficient to require summary judgment for the defendant.

Illinois: *Troman v. Wood*, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975). In reversing a dismissal of the case, the court held that negligence would be based upon whether the ordinary person had reasonable grounds to believe the statement to be true. The reliability of the sources of the statements and the failure to make a reasonable investigation are relevant factors.

Iowa: *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 158 (Iowa 1976). Although this case involved a public official, the court noted as "interesting" the Illinois decision in *Troman v. Wood*, *supra*.

Kansas: *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 233, 531 P.2d 76, 83 (1975). Summary judgment is premature when the question of negligence is present. Negligence, at least in the reporting of judicial proceedings, is based upon the "conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances." The reporter had either been told by the county attorney, or had erred in hearing him, that the plaintiff pleaded guilty to a crime, and did no further investigation. The case was remanded for inquiry as to whether or not negligence was present.

Louisiana: *Wilson v. Capital City Press*, 315 So. 2d 393, 397 (La. Ct. App.), *writ refused*, 320 So. 2d 203 (La. 1975). Neither willful nor negligent fault was present where a reporter identified an arrestee in a story based upon a police press release that was later shown to be incorrect. The reporter had no reason to doubt the correctness and authenticity of the release and therefore had no duty to verify its contents. In a similar case, reliance upon a police officer's "Incident Report" which later proved to be false was held to be proper. "At a minimum a publisher must have some knowledge which would place him on his guard, making him aware that further research was necessary to insure the veracity of his report." *LeBoeuf v. Times Picayune Publishing Corp.*, 327 So. 2d 430, 431 (La. Ct. App. 1976).

Maryland: *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). Although a non-media defendant and private defamation were

involved, the court decided to adopt a negligence test, rather than a higher standard, by following *Restatement (Second) of Torts* § 580B, see note 103 *supra*.

Massachusetts: *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 858, 330 N.E.2d 161, 168 (1975). In adopting a negligence test, the court felt that the term did not need discussion. Although a reference was made to *Restatement (Second) of Torts* § 580B, see note 103 *supra*, it was not expressly adopted. The case involved a fledgling reporter who misunderstood court testimony to refer to a father's ownership of a narcotic drug, rather than to the son. The editor who reviewed the story noticed its implausibility but did not check further. The former was characterized as "gross carelessness" and the latter as presenting a question of actual malice.

Missouri: One commentator has suggested that a negligence standard should be adopted, noting the guideline assistance of *Restatement (Second) of Torts* § 580B, see note 103 *supra*, with regard to journalistic standards and negligence factors. Comment, *The Impending Federalization of Missouri Defamation Law*, 43 Mo. L. REV. 270, 305-06 (1978). The current Missouri media libel standard for private plaintiffs, at least as to matters of public interest, is actual malice. *Woolbright v. Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1972).

North Carolina: *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 235-36, 228 S.E.2d 766, 767-68 (1976). The negligence standard was defined as relating to some act or omission of the publisher at the time of publication. Reliance upon police documents and characterizing a "nuisance" as a "public nuisance" did not amount to negligence.

Ohio: *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974), *cert. denied*, 423 U.S. 883 (1975). Recovery for actual damages could be had for "failure to exercise due care." A quotation of court testimony not supported by the transcript raises issues of negligence and actual malice. It must also be noted that the Ohio court would permit recovery if there was an express intent to injure, based upon ill will or the like. Under *Gertz*, this would not seem to be fault, and alone does not rise to actual malice.

Oklahoma: *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976). Negligence was defined as the failure to exercise the "care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances." In the absence of evidence of this degree of care, the jury "may measure the care re-

quired by the defendant by the application of this rule to other facts and circumstances in evidence before them."

Pennsylvania: *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978). A finding of negligence was precluded where two newspapers printed an erroneous photograph of a criminal suspect which was supplied by the police department. Summary judgment was inappropriate where there was some conflict as to whether the FBI supplied an erroneous photograph to a television news program and whether it was reasonable to rely on the FBI.

South Dakota: *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 833-35 (8th Cir. 1974). Although not formally adopting a negligence standard, the court appears to agree with the private plaintiff's position that such a standard is required by *Gertz*. A remand to the trial court was mandated where the evidence was insufficient to prove actual malice. In this case, the defendant did not investigate the plaintiff's financial background, but chose to base its story on a reliable source. Although appearing to adopt the *Restatement (Second) of Torts* § 580B formulation, see note 103 *supra*, one commentator has suggested that South Dakota apply an "ordinary negligence standard" as opposed to a journalistic-malpractice standard. Comment, *The Defamation Action For Private Individuals: The New Fault Standards*, 22 S.D.L. REV. 163, 177 (1977).

Tennessee: *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978). The court expressly adopted the "ordinary negligence" standard for defamation actions brought by private individuals against media defendants. The court held that "the conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances."

Texas: *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). The court held that a private individual must prove that a "publisher or broadcaster knew or should have known that the defamatory statement was false." Liability could not be had unless the statement's content would warn a reasonably prudent editor or broadcaster of its defamatory potential. *Id.* at 820 (citing RESTATEMENT (SECOND) OF TORTS § 580B (tent. draft No. 21, (1975))).

Washington: *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976). Without providing any further clarification, the court held that the defendant would be negligent "in publishing the statement, [if he] knew or, in the exercise of reasonable care,

should have known that the statement was false, or would create a false impression in some material respect.”

